In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN ROBERT DEMKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 21, 1965.

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania did not render an opinion. The opinion of the court of appeals (App. A., *infra*, pp. 8–16) is reported at 350 F. 2d 698.

JURISDICTION

The judgment of the court of appeals (App. B., *infra*, p. 17) was entered on September 21, 1965. By order of Mr. Justice Brennan the time for filing a petition for a writ of certiorari was extended to and

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including February 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal prisoner eligible for workmen's compensation benefits under 18 U.S.C. 4126 because of injuries he incurred in the course of his assigned prison employment may sue the United States under the Federal Tort Claims Act to recover for such injuries.

STATUTE INVOLVED

The pertinent provisions of Section 4126 of Title 18, United States Code, are as follows:

> All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.
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> * * * * *
>
> The corporation, in accordance with the laws generally applicable to the expenditures of the several departments and establishments of the government, is authorized to employ the fund, and any earnings that may accrue to the corporation, * * * in paying, under rules and regulations promulgated by the Attorney General, * * * compensation to inmates or their dependents for injuries suffered in any indus-

try or in any work activity in connection with the maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act.

STATEMENT

The facts are not disputed. In 1962, while an inmate of the federal penitentiary at Lewisburg, Pennsylvania, respondent was injured in the course of performing certain work required of him in connection with the maintenance of the prison.

Section 4126, *supra,* and regulations issued thereunder (28 C.F.R. § 301) provide for an award of workmen's compensation to federal prisoners injured in respondent's circumstances. Asserting that he was disabled as a result of those injuries, respondent applied for and was awarded such compensation in the amount of $180.00 per month.

After receipt of that award, respondent commenced this suit in 1963 under the Federal Tort Claims Act.[1] He sought additional recovery from the United States on the ground that the injuries he suffered in prison were the result of negligence on the part of federal prison officials. The district court rejected the only defense tendered—that respondent's right to workmen's compensation under 18 U.S.C. 4126 was his exclusive mode of redress against the United States—and, on July 13, 1964,

[1] 28 U.S.C. 1346(b), 2671, *et seq.*

entered a judgment of $20,000 in favor of respondent.[2]

The court of appeals affirmed, relying principally on *United States* v. *Muniz,* 374 U.S. 150, which had held that federal prisoners are not barred from bringing suit under the Tort Claims Act. Although neither prisoner involved in *Muniz* was eligible for compensation under 18 U.S.C. 4126 because neither was injured in the course of employment, the court of appeals read this Court's *Muniz* decision as establishing that a prisoner's right to sue under the Tort Claims Act would not be barred by the availability of a federal compensation remedy in the absence of express statutory language to that effect. The court below also rejected the government's argument, based on *Johansen* v. *United States,* 343 U.S. 427, and *Patterson* v. *United States,* 359 U.S. 495, that where Congress has made a remedy in the nature of workmen's compensation available to federal employees, that

[2] By stipulation filed with the district court, the parties agreed that respondent's injuries were proximately caused by the negligence of government employees and that $20,000, in addition to any compensation under 18 U.S.C. 4126 paid and payable to respondent, would be adequate compensation for the injuries sustained. The stipulation also provided that if the district court rejected the government's sole defense respondent was entitled to a judgment in the amount agreed upon, subject, however, to the government's right to seek further review of the question of whether respondent's right to compensation under 18 U.S.C. 4126 barred his suit under the Federal Tort Claims Act. It was further stipulated that respondent's "right to compensation pursuant to 18 U.S.C. 4126 is not affected by this suit. Regardless of the outcome of this suit [respondent] will have the same right to compensation as if suit had not been instituted."

remedy is presumed to be exclusive irrespective of an explicit statutory declaration to that effect..

Following the Third Circuit's decision in the instant case, the Second Circuit reached precisely the opposite result in *Granade* v. *United States* (No. 29,698, C.A. 2, decided February 9, 1966, App. C., *infra,* pp. 18–31), which affirmed a district court decison[3] restricting a federal prisoner injured at work in prison to his compensation remedy under 18 U.S.C. 4126. In its *Granade* opinion, the Second Circuit expressly noted and rejected the Third Circuit's conclusion that the prisoner compensation system was insufficiently comprehensive to justify the presumption that it was intended to be the exclusive means of redress against the government (App. C., *infra,* pp. 27*ff.*). The Second Circuit went on to rule (App. C., *infra,* p. 27):

> [T]he teaching of *Johansen* and *Patterson* has been consistently applied to foreclose suit under the Federal Tort Claims Act by federal employees who are eligible for benefits under federal compensatory schemes. We cannot believe that *Muniz* holds that, when federal employees are not allowed to pursue both remedies, federal prisoners may bring actions under the Federal Tort Claims Act even though they are also eligible for compensation benefits.
>
> We realize that our reading of *Muniz* is at variance with that of the Third Circuit in *Demko* v. *United States,* 350 F. 2d 698 (3 Cir. 1965), decided only a few months ago. It is our conclusion that the Third Circuit in *Demko*

[3] *Granade* v. *United States,* 237 F. Supp. 211 (S.D. N.Y.)

has misinterpreted the opinion of the Court in *Muniz,* and we do not adopt that interpretation.

REASONS FOR GRANTING THE WRIT

On the merits of the issue presented we are in full accord with the analysis and views of the Second Circuit expressed in *Granade* v. *United States,* reprinted *infra.* Because of the recurrent nature of the problem, indicated by the number of other suits raising the same issue presently pending in district courts in several circuits,[4] and in view of the direct conflict between the Second and Third Circuits on the question presented, we believe that review by this Court is plainly warranted.[5]

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[4] *Gonzales, et al.* v. *United States* (three plaintiffs), Civ. No. 150–Globe, D. Ariz.; *Gomez* v. *United States,* Civ. No. 8986, D. Colo.; *Cole* v. *United States,* Civ. No. 1560, N.D. Ga.; *Eidum* v. *United States,* Civ. No. 9564, N.D. Ga.; *Haithcock* v. *United States,* Civ. No. AC–1662, D. S.C.; *Aguilar* v. *United States,* Civ. No. 3326, W.D. Wash.; *Armstrong* v. *United States,* Civil No. 3354, W.D. Wash.; *Foster* v. *United States,* Civ. No. T–3875, D. Kans.; *Pfrimmer* v. *United States,* Civ. No. KC–2414, D. Kans.

[5] In the event that appellant in *Granade* v. *United States* petitions this Court for review of the decision of the Second Circuit, we would, of course, acquiesce in the grant of a writ of certiorari in that case.

CONCLUSION

For the reasons stated, the petition for certiorari in this case should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

FEBRUARY 1966.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 15087

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 9, 1965

Before GANEY and FREEDMAN, *Circuit Judges,* and KIRKPATRICK, *District Judge*

OPINION OF THE COURT

(Filed September 21, 1965)

By FREEDMAN, *Circuit Judge:*

Plaintiff brought this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.,* for damages for personal injuries sustained on March 12, 1962 while performing maintenance work which he was ordered to do as an inmate of the Federal Penitentiary at Lewisburg, Pennsylvania. On his release

from prison he was awarded compensation of $180 monthly from Federal Prison Industries, Inc., under 18 U.S.C. § 4126. He later brought this action, which the Government moved to dismiss on the ground that the compensation payments were his exclusive remedy. The motion to dismiss was denied.[1] The parties later entered into a stipulation in which the Government admitted its negligence, agreed that $20,000 in addition to the compensation already received and to be paid in the future would adequately compensate the plaintiff for his injuries, and that on the basis of the District Court's decision plaintiff was entitled to a judgment in the amount of $20,000. The stipulation reserved the Government's right to maintain its defense on appeal and provided that the plaintiff's right to compensation would not be affected by the present action. Pursuant to this stipulation judgment was entered in favor of the plaintiff and against the United States in the amount of $20,000. From this judgment the Government has appealed.

The question is whether § 4126 of Title 18 is plaintiff's exclusive remedy and bars the present action under the Federal Tort Claims Act.[2] Section 4126 provides that all moneys under the control of Federal Prison Industries or received from the sale of its

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[1] The motion was for summary judgment but the court below treated it as a motion to dismiss the complaint because no answer to the complaint had been filed, although the motion was accompanied by affidavits. Cf. Rule 12(b). In view of the subsequent judgment, this procedural detail need not be reviewed.

[2] The cases are divided. The Government's view prevailed in *Nobles* v. *Federal Prison Industries, Inc.*, 213 F. Supp. 731 (N.D. Ga. 1963); *Granade* v. *United States*, 237 F. Supp. 211 (S.D. N.Y. 1965), appeal pending. Plaintiff's view prevailed in *Gomez* v. *United States*, — F. Supp. — (D.C. Colo. 1965) (34 Law Week 2055 (July 27, 1965)).

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products or by-products or for the services of federal prisoners, shall be maintained in a Prison Industries Fund in the Treasury of the United States. The section also provides, in part, that the fund may be employed "in paying, under rules and regulations promulgated by the Attorney General, * * * compensation to inmates or their dependents for injuries suffered in any industry." In 1961 the section was amended by adding a provision for compensation for injuries suffered by inmates "in any work activity in connection with the maintenance or operation of the institution where confined."[3] The purpose of the amendment was to eliminate the discriminatory difference in treatment between prisoners employed in activities of Federal Prison Industries, who were afforded compensation for injuries, and prisoners working in various other institutional and maintenance operations, who were not entitled to compensation.[4]

In *United States v. Muniz,* 374 U.S. 150 (1963), the Supreme Court recently made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act. The opinion was written by the Chief Justice for a unanimous Court. Its avowed purpose was to explore fully the intent of Congress in adopting the Federal Tort Claims Act, and it reviewed the effect of compensation benefits on the remedy afforded by the Act. It therefore points the way to our conclusion. The Court, after examining the circumstances surrounding the adoption of the Act, concluded that "it is clear that Congress in-

[3] Act of September 26, 1961, Pub. L. 87–317, 75 Stat. 681, 18 U.S.C. § 4126.

[4] Sen. Rep. No. 1056 (87th Cong., 1st Sess., 1961), reprinted at 2 U.S. Code Congr. and Admin. News, 1961, p. 3028.

tended to waive sovereign immunity in cases arising from prisoners' claims." (374 U.S., at 158). The Court rejected the Government's argument that an exception should be implied because of the requirements of prison discipline, and because of *Feres v. United States,* 340 U.S. 135 (1950), which held that the United States was not liable under the Act for injuries sustained by a member of the armed forces in the course of activity incident to his military service. Finding that the ultimate justification for the *Feres* decision was the necessity of maintaining military discipline, the Court declared that there was no such necessity in regard to prisoners, as was shown by the experience of those states which permitted suits by prisoners. But the Court also considered the language of *Feres* dealing with the effect of a compensation plan, saying: "* * * [T]he presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence. * * * [T]he compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz [the respondents] would have been covered." (374 U.S., at 160). In a footnote the Court pointed out that even the broadened compensation coverage of prisoners provided by the amendment of 1961 failed to reach all prisoners, and added: "And, in any event, the compensation system still fails to provide for non-work injuries, contrary to that applicable to military personnel." (374 U.S., at 160, n. 17).

The Supreme Court's careful analysis of the intention of Congress in adopting the Federal Tort Claims Act in 1946 makes it clear that claims by prisoners for negligence fall within the Act and that this coverage is not to be cancelled whenever thereafter some

alteration is made in the provision of compensation for prisoners. If such compensation is intended to create either an election of remedies or an obliteration of the remedy for tort, it is to be expected that Congress will express such intention in the compensation statute, especially if it does not establish a full and comprehensive plan.

Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being "simple, certain, and uniform" (340 U.S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General,[5] but may not under the statute exceed the amount payable under the Federal Employees Compensation Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.[6] There is no provision for the claimant to have a personal physician present at his physical examination,[7] and there is no opportunity for administrative re-

[5] See Note, Denial of Prisoners' Claims Under the Federal Tort Claims Act, 63 Yale L. J. 418, 423 (1954).

[6] Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 11, 28 C.F.R. §§ 301.1, 301.2.

[7] Compare Federal Employees Compensation Act, § 21, 5 U.S.C. § 771.

view.[8] Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.[9]

What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act.

The Government, however, argues that the *Muniz* case is not controlling here because the two prisoners involved in that case were not covered by any compensation plan, and that all that was said by the Court therefore was dicta. They urge that applicable here is the principle applied in *Johansen* v. *United States,* 343 U.S. 427 (1952),[10] reaffirmed in *Patterson* v. *United States,* 359 U.S. 495 (1959). In *Johansen* the petitioners were injured in the performance of their duties as seamen. They were concededly within the Federal Employees Compensation Act (5 U.S.C. §§ 751, *et seq.*). They sued, however, to recover dam-

[8] Compare Federal Employees Compensation Act, § 37, as amended, 5 U.S.C. § 787.

[9] Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 16, 28 C.F.R. § 301.5.

[10] Affirming *Johansen* v. *United States* 191 F. 2d 162 (2 Cir. 1951), and *Mandel* v. *United States*, 191 F. 2d 164 (3 Cir. 1951).

ages from the United States under the Public Vessels Act of 1925 (46 U.S.C. §§ 781, *et seq.*). The Court held that although the language of the Public Vessels Act appeared to permit such a suit, its central purpose as ascertained from its legislative history and the circumstances surrounding its enactment, led to the conclusion that Congress did not intend it to confer the right to sue on claimants who were entitled to the benefits of the Federal Employees Compensation Act. Among the reasons for the Court's conclusion was the fact that the Federal Employees Compensation Act covers all government employees, to whom it brought the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment: "All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S., at 441.) [11]

Thus the essence of *Johansen* is that the Federal Employees Compensation Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

The difference between the effect of general compensation available to government employees under the Federal Employees Compensation Act and that

[11] The 1949 amendment to the Federal Employees Compensation Act, which was passed after the Johansen case arose, expressly made the Act exclusive of other remedies against the United States.

of compensation plans dealing with special circumstances, on rights under the Federal Tort Claims Act is illustrated by *United States* v. *Brown,* 348 U.S. 110 (1954). It was there held that a veteran could maintain an action under the Federal Tort Claims Act for damages for negligent medical treatment in a Veterans Administration hospital aggravating a service-connected injury, even though he had received additional compensation because of the aggravation, since Congress had given no indication that the right of veterans to compensation was an exclusive remedy. Johansen was distinguished as involving a general workmen's compensation plan.[12]

The limited and discretionary compensation scheme provided by § 4126 is not comparable to the system of compensation provided for government employees by the Federal Employees Compensation Act. Limited as it is in both the scope of its coverage and the relief it extends, it is not such a broad and general system of compensation that it may be deemed impliedly to express a congressional intention to except federal prisoners injured in the course of their work as inmates from the remedial protection afforded by the Federal Tort Claims Act. The Act, as the Supreme Court has said, "provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies

[12] Similarly, *Brooks* v. *United States,* 337 U.S. 49 (1949), holding that servicemen who recovered compensation for injuries were not barred from suing under the Federal Tort Claims Act if the injuries were sustained while on furlough. See also Annotation, 84 A.L.R.2d 1059.

provided by Congress." *United States* v. *Muniz*, 374 U.S. 150, 165–66 (1963).

The judgment therefore will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 15,087

STEPHEN ROBERT DEMKO
v.
UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil No. 63–803)

On Appeal from the United States District Court For the Western District of Pennsylvania

Present: GANEY and FREEDMAN, *Circuit Judges,* and KIRKPATRICK, *District Judge*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed July 14, 1964, be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

SEPTEMBER 21, 1965.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32—September Term, 1965

(Argued October 4, 1965 Decided February 9, 1966)

Docket No. 29698

LOUIS H. GRANADE, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before WATERMAN, HAYS and ANDERSON,
Circuit Judges

Appellant, alleging injury while in federal custody as a prisoner, sought recovery under the Federal Tort Claims Act after his release by commencing suit against the United States in the United States District Court for the Southern District of New York. The Government moved for summary judgment which was granted with prejudice, Palmieri, *J.* Affirmed.

PARNELL J. T. CALLAHAN (Joseph J. Strelkoff, of counsel), New York City, *for Plaintiff-Appellant.*

RICHARD S. SALZMAN, Atty., Dept. of Justice; John W. Douglas, Asst. Atty. Gen.; Robert M. Morgenthau, U.S. Atty.; Alan S. Rosenthal, Atty., Dept. of Justice, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge:*

The plaintiff-appellant, Louis Granade, commenced this suit in the United States District Court for the Southern District of New York seeking to recover damages under the Federal Tort Claims Act,[1] for personal injuries he allegedly received while confined in the Federal House of Detention in New York City awaiting sentence on a criminal charge to which he had entered a plea of guilty.

Appellant alleges that on September 13, 1962 he was assigned to operate the prison public address system. To perform this task he was obliged to sit at a table located directly underneath a shelf on which rested an emergency light. The light was not securely fastened to the shelf and while he was at work a door was slammed causing the light to topple forward and strike him on the head and the right hand. He alleges that the various injuries he sustained from this accident were caused solely by the negligence of the defendant United States and its employees.

The present suit was commenced in May 1964, prior to the appellant's release from prison.[2] In the

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[1] Chapter 753, 60 Stat. 842 (1946) (codified in scattered sections of Title 28 of the United States Code).

[2] Appellant was discharged from prison on January 4, 1965. In an administrative proceeding unrelated to the present case, he sought accident compensation for a disability continuing after his discharge. See Inmate Accident Compensation Regu-

fall of that year the Government moved for summary judgment pursuant to Fed. R. Civ. P. 56 for failure to state a claim upon which relief could be granted. It pointed out that at the time of appellant's alleged injury he was lawfully in federal custody performing assigned work activities in a federal penal institution, and that Congress had made available a remedy in the nature of workmen's compensation for injuries incurred under these circumstances. See 18 U.S.C. § 4126. It argued that appellant's suit should be dismissed because the compensation system for federal prisoners injured in the course of performing duties assigned them in connection with the operation of a federal penal institution was appellant's exclusive remedy.

On January 25, 1965 the district court granted the Government's motion for summary judgment. In support of this result the lower court first observed it was "undisputed that the plaintiff's injury is compensable under 18 U.S.C. § 4126 * * *" *Granade* v. *United States,* 237 F. Supp. 211, 212 (S.D.N.Y. 1965). The lower court went on to rule that:

> The entire statutory scheme of remedies against the Government is based on the principle that where there is a remedy available in the form of a compensation system, there is no concurrent right to sue under the Federal Tort Claims Act. *Ibid.*

Granade's appeal from this order presents us with the narrow but important question whether the dis-

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lations, 28 C.F.R. § 301.2 (1959). The Accident Compensation Committee, which administers the compensation program, rejected appellant's claim for compensation benefits "based on medical evidence that any disability you now have is not related to any injury [sustained in prison]." There is no formal provision made for an administrative review of a denial of a compensation claim. And the correctness of this administrative determination is not at issue in this judicial proceeding.

trict court erred in ruling that compensation for plaintiff-appellant's injury under 18 U.S.C. § 4126 is his exclusive remedy against the United States.

I

Appellant draws our attention to the fact that 18 U.S.C. § 4126, the statutory authorization for a system of federal prisoner compensation, contains no explicit indication that Congress intended this compensation system to be the exclusive remedy for prisoners injured while performing duties related to the operation of a federal penal institution. Appellant further notes, with equal accuracy, that the Federal Tort Claims Act does not in terms bar suit by prisoners for injuries also compensable under the federal scheme of prisoner compensation.[3] Since both statutes are silent on this crucial point, appellant argues that we should permit him to bring this present suit grounded upon the Federal Tort Claims Act.[4]

In so arguing we believe appellant would have us overlook a principle of construction to which courts invariably advert when they attempt to fit disparate types of statutory remedies against the federal government into a "workable, consistent and equitable whole." *Feres* v. *United States,* 340 U.S. 135, 139 (1950). The principle can be put quite simply: When Congress has established a scheme of compensation to provide a remedy for personal injuries suffered in the course of federal employment, the com-

[3] *United States* v. *Muniz*, 374 U.S. 150 (1963), held that an inmate of a federal prison, claiming injury as a result of the negligence of prison officials, is not barred from suing the United States under the Tort Claims Act simply by reason of his status as a prisoner.

[4] Indeed, appellant urges that the decision of the Court in *United States* v. *Muniz*, *supra* note 3, requires us to allow this suit to proceed. See *infra* point II.

pensation system is presumed to be the exclusive means of redress against the government for all persons eligible for the system's benefits, even if Congress has not stated that the compensation scheme should be exclusive.

This resilient principle of construction was clearly articulated in *Johansen* v. *United States,* 343 U.S. 427 (1952), a case involving a civilian injured while employed on a United States Army transport vessel. As a civil service employee Johansen was concededly eligible to receive benefits under the Federal Employees' Compensation Act of 1916.[5] However, at the time of Johansen's injury the Act did not provide that it was the exclusive remedy against the federal government. Johansen elected to sue the Government under the Public Vessels Act of 1925.[6] No provision in the Public Vessels Act explicitly precluded suit by persons entitled to benefits under the Federal Employees' Compensation Act. In this setting the Supreme Court held that in passing the Federal Employees' Compensation Act Congress presumably intended it to be the exclusive remedy for those injured employees who came within its coverage. After exhaustively examining the rather inconclusive legislative history of the two federal acts the Court concluded in *Johansen* that when the "Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." 343 U.S. at 441. Seven years later in *Patterson* v. *United States,* 359 U.S. 495 (1959) the Court declined to reconsider the teaching of *Johansen.* And it would now seem to be well settled that if a remedy is available under the Federal Employees'

[5] 5 U.S.C. §§ 751–94.
[6] 46 U.S.C. §§ 781–90.

Compensation Act for injuries sustained in the course of employment, this remedy is exclusive, and no concurrent remedy exists under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799 (5 Cir.), *cert. denied,* 86 Sup. Ct. 70 (1965); *Somma* v. *United States,* 283 F. 2d 149 (3 Cir. 1960); *Mills* v. *Panama Canal Co.,* 272 F. 2d 37 (2 Cir. 1959), *cert. denied,* 362 U.S. 961 (1960).

This same principle of construction is also regularly applied in tort liability suits brought against the federal government by persons eligible for benefits under federal compensatory schemes other than the Federal Employees' Compensation Act, even though these other compensation schemes also lack explicit indication that Congress intended them to be exclusive. See *United States* v. *Forfari,* 268 F. 2d 29 (9 Cir.), *cert. denied,* 361 U.S. 902 (1959); *Aubrey* v. *United States,* 254 F. 2d 768 (D.C. Cir. 1958); *Lewis* v. *United States,* 190 F. 2d 22 (D.C. Cir.), *cert. denied,* 342 U.S. 869 (1951).

In view of the unanimity with which courts have announced that injured persons entitled to receive benefits under a federal compensation scheme must look exclusively to that scheme for redress, we would be inclined to apply the principle in the present case even if the principle were logically unsupportable. Fortunately, however, the policy underlying the principle is both apparent and quite sensible. Courts hold that federal compensation acts, when applicable, are presumably intended to afford an exclusive remedy on the ground that this is one aspect of a *quid pro quo* whereby the federal government assumes a liability irrespective of fault and in return is relieved of the prospect of suffering large damage verdicts. See 2 Larson, *Workmen's Compensation Law* § 65.10

(1961). Of course, we recognize that Congress can legislate otherwise; but in the absence of evidence as to congressional intent to do so, it seems most sensible to presume that when Congress provides a system of simple, certain, and uniform benefits it intends this system to be the exclusive means of redress for all those who come within its scope.

The foregoing discussion inclines us toward the application of this "exclusive remedy" principle in the present case and thus affirmance of the district court's grant of the Government's motion for summary judgment; appellant, however, advances two separate arguments that the principle is inapplicable here and urges that these contentions compel us to reverse the district court.

II

Appellant first urges that in *United States* v. *Muniz*, 374 U.S. 150 (1963) the Supreme Court made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act, even though the injuries are also compensable under Section 4126. To support this view of *Muniz* appellant points to the Court's statement in that case that in suits by prisoners brought under the Federal Tort Claims Act, as the suits there involved had been, "the presence of a compensation system * * * does not of necessity preclude a suit for negligence." 374 U.S. at 160. Viewed, however, in context, the quoted language fails to support appellant's position. *Muniz* disposed of appeals in two separate suits commenced by prisoners in the Southern District of New York. In both cases the district court had granted the Government's motion to dismiss on the ground that

prisoners by reason of their status as prisoners could not sue under the Federal Tort Claims Act. Our court, siting *in banc,* reversed, four judges dissenting. 305 F. 2d 264; 305 F. 2d. 287.

Before the *in banc* court the Government argued that the lower court should be affirmed because, *inter alia,* the existence of a prisoner's compensation scheme was indicative of a congressional intent to foreclose suit by prisoners under the Federal Tort Claims Act. Rejecting this argument we noted that the applicable system of prisoner compensation covered "only a very small portion of the injuries that are sustained by federal prisoners * * *" 305 F. 2d at 269,[7] and we recognized that neither of the two prisoner-appellants was eligible for compensation under the system. We went on to conclude that a prisoner compensation system of such limited scope could not with reason be said to bar suit under the Federal Tort Claims Act by prisoners who concededly were not included within the system and hence were not eligible for compensation benefits. We believe the

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[7] Prior to 1961 the federal system of prisoner compensation provided benefits only for prisoners working for Federal Prison Industries, Inc. Only twenty percent of all federal prisoners were so engaged. See *United States* v. *Muniz*, 374 U.S. at 160, n. 17. In 1961 the program was expanded in order to eliminate the difference in treatment between prisoners employed in activities of Federal Prison Industries, Inc., who were afforded compensation for their injuries, and prisoners working in various other institutional operations who were not entitled to compensation. Act of September 26, 1961, Pub. L. 87-317, 75 Stat. 681, 18 U.S.C. § 4126. See S. Rep. No. 1056, 87th Cong., 1st Sess. (1961). Both prisoners injured in *Muniz* were injured prior to the 1961 expansion of coverage. And both were ineligible for benefits under the pre-1961 system. They would also have been ineligible under the post-1961 system because neither suffered injury while doing work connected with the maintenance of a penal institution.

Supreme Court's language to which appellant points means only that prisoners like Muniz, who are ineligible for compensation benefits, are not foreclosed from commencing tort suits against the Government when a scheme exists that provides compensation benefits to certain other prisoners. So understood *Muniz* does not support the present appellant's position because appellant was concededly eligible for benefits under 18 U.S.C. § 4126.

There are further grounds supporting our conclusion that *Muniz* did not hold that prisoners eligible for Section 4126 compensation benefits may also sue for damages under the Federal Tort Claims Act. First, the Court in *Muniz* stated that it had granted certiorari to resolve a conflict between the circuits on the issue whether federal prisoners were, solely by reason of their status as prisoners, disqualified from suit under the Federal Tort Claims Act. In none of the conflicting cases referred to by the Court were the prisoners who sought relief under the Federal Tort Claims Act eligible for federal compensation benefits.[8] Second, in *Muniz* the Court made no attempt to deal with the general teaching of cases as *Johansen* and *Patterson, supra.* This lack of comment was due, we believe, to the fact that the issue whether an individual eligible for federal compensation benefits may also sue under the Federal Tort Claims Act was not before the Court in *Muniz.* In these circumstances we think it highly unlikely that the Court's

[8] Neither of the prisoners involved in *Muniz* were eligible for federal compensation benefits. See note 7 *supra.* This was also true of the federal prisoners involved in the conflicting Seventh and Eighth Circuit cases mentioned by the Court. *James* v. *United States*, 280 F. 2d 428 (8 Cir.), *cert. denied*, 364 U.S. 845 (1960); *Lack* v. *United States*, 262 F. 2d 167 (8 Cir. 1958); *Jones* v. *United States*, 249 F. 2d 864 (7 Cir. 1957).

language in *Muniz* to which appellant points was designed *sub silentio* to overrule the carefully considered position the Court had previously announced in *Johansen* and had reaffirmed in *Patterson*. Third, as we have noted earlier, the teaching of *Johansen* and *Patterson* has been consistently applied to foreclose suit under the Federal Tort Claims Act by federal employees who are eligible for benefits under federal compensatory schemes. We cannot believe that *Muniz* holds that, when federal employees are not allowed to pursue both remedies, federal prisoners may bring actions under the Federal Tort Claims Act even though they are also eligible for compensation benefits.

We realize that our reading of *Muniz* is at variance with that of the Third Circuit in *Demko* v. *United States*, 350 F. 2d 698 (3 Cir. 1965), decided only a few months ago.[9] It is our conclusion that the Third Circuit in *Demko* has misinterpreted the opinion of the Court in *Muniz*, and we do not adopt that interpretation.

III

Appellant also urges that 8 U.S.C. § 4126 should not be presumed to be the exclusive means of redress against the Government for those individuals within its scope because Section 4126 "is not a comprehensive compensation program." The Third Circuit's decision in *Demko* was bottomed in part on that court's conclusion that the compensation program for prisoners was "discretionary and sketchy." 350 F. 2d at 701. We believe, to the contrary, that the prisoner compensation program under consideration is sufficiently comprehensive to justify our holding that

[9] *Demko* was decided on September 21, 1965, after the decision of the district court in the present case had been filed but before we heard oral argument on the appeal.

it is appellant's exclusive means of redress against the Government.

Section 4126 states that all moneys under the control of Federal Prison Industries or received from the sale of its products or by-products or the services of federal prisoners, shall be maintained in a Prison Industries Fund in the United States Treasury. The section goes on to state that Federal Prison Industries is authorized *inter alia* "to employ the fund * * * in paying, under rules and regulations promulgated by the Attorney General * * * compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." 18 U.S.C. § 4126. True, Section 4126 does not explicitly require that such a compensation system be established, neither does the section specify a certain mode of operation; nevertheless a compensation scheme has been established and embodied in regulations.[10] This system of compensation does not become less than comprehensive simply because the details of the system are spelled out in regulations rather than in the authorizing statute.[11] And

[10] See Inmate Accident Compensation Regulations, 28 C.F.R. § 301.1–.10 (1959). A comprehensive exegesis of these regulations is distributed to federal prisoners in pamphlet form. Federal Prison Industries, Inc., *Inmate Accident Compensation Regulations* (1962) [hereinafter *Inmate Compensation Pamphlet*]. This pamphlet is set out in full in the appendix to the Government's brief in the present case. The provisions of 28 C.F.R. § 301.1–.10 (1959) do not seem to conflict with the more comprehensive statement of the prisoner compensation system set forth in the *Inmate Compensation Pamphlet*. Certainly no conflict exists that is relevant to the present case.

[11] At least one other federal compensation system has been construed to provide the exclusive remedy for those within its terms even though the authorizing statute was not significantly more detailed than is Section 4126. Prior to its amendment

an examination of the regulations makes it quite clear that an award of compensation under Section 4126 is not discretionary but is mandatory as to any claim that comes within their terms.

Appellant nevertheless contends that the system of compensation is less than comprehensive because compensation is paid only upon the inmate's release from penal custody and is denied if full recovery has occurred before the date of release. This argument is in part simply incorrect; prisoners injured while performing paid prison jobs continue to receive full pay while disabled (after a short waiting period) even though they are in prison.[12] It is true that prisoners injured while performing jobs for which no pay is received do not receive compensation benefits until they are released from prison and then only if full recovery has not occurred. However, inasmuch as such prisoners have experienced no loss of earnings, and have received food, clothing, shelter, and medical attention during the period of their in-

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in 1958 Section 150k–1 of Title 5 required only that certain military establishments operating on nonappropriated funds—self-supporting cafeterias and officers' messes—"provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment." Ch. 444, § 2, 66 Stat. 139 (1952) (now § 1, 72 Stat. 397 (1958), 5 U.S.C. § 150k–1). It is true that the pre-1958 statute went on to provide that compensation shall not be less than that provided in the state where the workers are employed; nevertheless, with this exception, old Section 150k–1 was no more detailed than is Section 4126. Yet the cases uniformly hold that old Section 150k–1 provided an exclusive remedy. See *Rizzuto* v. *United States*, 298 F. 2d 748 (10 Cir. 1961); *Lowe* v. *United States*, 292 F. 2d 501 (5 Cir. 1961), *affirming*, 185 F. Supp. 189 (D. Miss. 1960); *United States* v. *Forfari*, 268 F. 2d 29 (9 Cir.), *cert. denied*, 361 U.S. 902 (1959); *Aubrey* v. *United States*, 254 F. 2d 768 (D.C. Cir. 1958).

[12] Section 301.1, 28 C.F.R. (1959); § 11 *Inmate Compensation Pamphlet.*

carceration, we find nothing untoward in this result.

Appellant also maintains that the compensation program for prisoners is less than comprehensive because it "does not compensate a prisoner for any * * * pain and suffering which he may endure while in prison." This is admittedly so. However, the theory of workmen's compensation legislation is that in return for a guaranteed recovery only those items of damage that adversely affect earning power are compensable. See *Sweeting* v. *American Knife Co.*, 226 N.Y. 199, 123 N.E. 82, *aff'd sub nom. New York Cent. R.R. Co.* v. *Bianc*, 250 U.S. 596 (1919); 1 Larson, *Workmen's Compensation Law* § 2.40 (1961). Therefore, though appellant while in prison may have experienced pain and suffering due to his work-related injury for which he has received no compensation, that has no bearing on whether § 4126 should be considered an exclusive remedy. What is relevant is whether this section and the related regulations afford all the benefits usually provided by workmen's compensation legislation, and in our judgment they do. The regulations adopted pursuant to Section 4126 provide all necessary medical, surgical, and hospital services whether required during incarceration or after discharge.[13] If disability persists beyond release inmates are accorded monthly compensation benefits based on the provisions of the Federal Employees' Compensation Act.[14] The right to such compensation is not dependent upon evidence of fault or negligence on the part of the Government; nor is it defeated by the prisoner's own contributory negligence, although, in common with the Federal

[13] Section 301.8, 28 C.F.R. (1959); §§ 2, 17 *Inmate Compensation Pamphlet.*

[14] Section 301.2, 28 C.F.R. (1959); §§ 12, 13 *Inmate Compensation Pamphlet.*

Employees' Compensation Act,[15] benefits are not payable for injuries caused by the willful misconduct of the prisoner.[16]

We conclude that the district court's grant of appellee's motion for summary judgment should be affirmed on the ground that appellant's injuries were compensable under the system of prisoner compensation established pursuant to 18 U.S.C. § 4126 and therefore he may not maintain this action under the Federal Tort Claims Act.

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[15] 5. U.S.C. § 751(a).

[16] 301.4, 28 C.F.R. (1959); § 10 *Inmate Compensation Pamphlet.* In *Demko* v. *United States*, 350 F. 2d 698 (3 Cir. 1965), it was also suggested that the prisoner compensation program was less than comprehensive because the regulations contained no provision for a claimant seeking compensation benefits to have a personal physician present at his physical examination. As we understand the operation of this program, nothing prevents an ex-prisoner from accompanying his claim for benefits with the examination report of his own physician. The Third Circuit also observed that there is no formal provision for administrative review of the Accident Compensation Committee's decision. Although this observation is correct, we do not believe it warrants a holding that 18 U.S.C. § 4126 is not the exclusive remedy for those who come within its terms. The lack of judicial review of final compensation orders has never been thought grounds for holding that a particular compensation system is other than exclusive. See, e.g., *Blanc* v. *United States*, 244 F. 2d 708 (2 Cir.), *cert. denied*, 355 U.S. 874 (1957).

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